There will therefore be judgment for the Government of Malaysia against the defendants for $2,683.

On the question of costs, if I consider that the Government has succeeded only on its last minute amendment and that the Government has in this action persisted in its full claim when in the *Thelma Fernandez's* case it had accepted the hint to compromise, I should, I think, hold that the more reasonable order would be that each party should pay its own costs and I so order.

Claim partly allowed.

Solicitors: *Lim Cheng Ean & Co.*

TAY WEE KHYUN v. AMERICAN INTERNATIONAL ASSURANCE CO. LTD. THE "YULING No. 2"

[O.C.J. (B.T.H. Lee J.) December 31, 1970]

[Kuching — Civil Suit No. K.37 of 1969]

Insurance — Marine insurance — Salvage — Salvage charges — Particular charges — Total loss — Partial loss — Whether insurance policy covers particular charges and partial loss.

Shipping — Capsized vessel — Salvage remuneration and repairs.

The plaintiff, the owner of a vessel insured against marine losses with the defendants, brought a claim against the defendants for salvage remuneration and repairs. The vessel had capsized and the plaintiff took steps to salvage the ship. The policy covered total loss and constructive total loss and salvage cost.

Held: (1) the expenses incurred by the plaintiff were not salvage charges but particular charges and the insurance policy in this case did not expressly provide cover for particular charges;

(2) the present case was not a case of total loss, either actual or constructive but one of partial loss;

(3) as the claim in this case was for particular charges and not salvage charges and as the policy in this case covered only salvage charges and was for only total loss, actual or constructive, the claim of the plaintiff must fail.

Cases referred to:-

(1) *Hird* v. *Rea Ltd.* (1939) 63 Ll. L.R. 263.

(2) *Ralli* v. *Janson* 119 E.R. at p. 925.

(3) *Overseas Commodities Ltd.* v. *Style* [1958] 1 Ll. L.R. 546.

(4) *Yorkshire Insurance Co. Ltd.* v. *Campbell* [1917] A.C. 218.

(5) *Hart* v. *Standard Marine Insurance Co. Ltd.* (1889), 22 Q.B.D. 499.

(6) *Miller* v. *Borner & Co.* [1900] 1 Q.B. 691.

(7) *Aktieselskabet Reidar* v. *Arcos Ltd.* [1927] 1 K.B. 352.

CIVIL SUIT.

C. T. Wong (*T. K. Sim* with him) for the plaintiff.

S. K. Reddi (*C. S. Wu* with him) for the defendants.

Cur. Adv. Vult.

B.T.H. Lee J.: The plaintiff in this case, the owner of a steel barge *Yuling No. 2*, was insured against marine perils under a policy of marine insurance in the sum of $100,000.

The vessel was designed to carry logs, heavy equipment and cargo. The vessel was insured with the American International Assurance Company Limited, the defendants, for total loss and constructive total loss, and to include salvage cost.

As a result of events occurring on 18th December, 1967, the vessel laden with 700 tons of stones capsized off the coast of Bintulu.

The plaintiff informed the insurance agent of the occurrence. Thereafter the plaintiff took steps to salvage the vessel.

The action was brought to recover against the defendants salvage remuneration and repairs for the sum of $40,534.51, and general damages.

The plaintiff by his statement of claim alleged as follows: —

"(1) The plaintiff was insured to the amount of M$100,000.00, under a policy of Marine Insurance for that amount, dated the 21st day of September, 1967 on the steel barge *Yuling No. 2* subscribed by the above-mentioned defendants for M$100,000.00. The said plaintiff now claims under the said policy of Marine Insurance for the amount of M$40,534.51 in respect of charges for salvage of and repairs effected on the said *Yuling No. 2*.

(2) By the said policy of Marine Insurance, Hull Insurance policy No. 191946, dated the 21st day of September, 1967 the said defendants in consideration of a premium of M$2,730.14 insured the said plaintiff for M$100,000.00 upon the said *Yuling No. 2* whilst it was engaged in carrying logs, heavy equipment and general cargo between Sarawak, Brunei and Sabah ports during the period of noon of the 15th day of September, 1967 to noon of the 13th day of July, 1968 against total and/or constructive total loss including salvage and repair charges caused by the perils of the seas.

(3) Whilst on a voyage from Sebuyau to Miri on or about the 13th day of December, 1967, and whilst the plaintiff was insured as aforesaid, the said *Yuling No. 2*, owing to foul weather and rough seas, capsized off the coast of Bintulu on the morning of the 18th day of December, 1967, thereby involving the plaintiff in loss and expenses for salvage and repairs aforesaid."

Particulars of the said loss and expenses are shown as follows: —

"(1) The cost of hiring 4 tugboats to attempt to tow *Yuling No. 2* from the sea to Bintulu River as from the 19th to 21st day of December, 1967 (3 days) at M$100.00 each boat per day	$ 1,200.00
(2) The cost of hiring one tugboat to stand by on guard of *Yuling No. 2* while it was at sea off Bintulu coast	$ 450.00
(3) The cost of hiring 4 tugboats to pull *Yuling No. 2* from grounded site near the mouth of Bintulu River to Bintulu at M$300.00 each	$ 1,200.00
(4) The cost of towing *Yuling No. 2* from Bintulu to Miri by 2 tugboats from the 18th to 24th day of January, 1968 (7 days) at M$400.00 each boat per day	$ 5,600.00
(5) The cost of hiring 2 tugboats to pull *Yuling No. 2* to facilitate upturning at M$200.00 each boat per day for 3 days	$ 1,200.00

(6)	The cost of employing 8 men to pull and tie ropes to *Yuling No. 2* to facilitate towing from the sea to Bintulu River from the 19th to 28th day of December, 1967 (10 days) at the rate of M$7.00 wages each man per day and M$1.50 overtime wages each man per hour for 6 hours each working day	$ 1,280.00
(7)	The cost of employing 10 fishermen to work under water to remove all steel pipes, stanchions, crew compartments, anchor chain and winch bolts, for 6 days at M$15.00 one man per day	$ 900.00
(8)	The cost of hiring 2 oxygen welding and cutting machines for use on *Yuling No. 2*	$ 1,550.00
(9)	The cost of hiring 1 oxygen welding and cutting equipment for use on *Yuling No. 2* from the 24th to 28th day of December, 1967 (5 days) at M$100.00 per day	$ 500.00
(10)	The cost of employing 6 men to tie ropes to *Yuling No. 2* to facilitate towing from grounded site near the mouth of Bintulu River to Bintulu from the 24th to 28th day of December, 1967 (5 days) at M$7.00 each man per day	$ 210.00
(11)	The cost of hiring 3 water pumps to draw water from *Yuling No. 2* as from 24th to 28th day of December, 1967, (5 days) and then as from 22nd to 28th day of February, 1968 (7 days) at M$30.00 per pump each day	$ 1,080.00
(12)	The cost of hiring 3 men and 1 mechanic to assist pumping water out of *Yuling No. 2* as from the 24th to 28th day of December, 1967 (5 days) and then from 22nd to 28th day of February, 1968 (7 days) at M$8.00 each per day for 3 men and M$15.00 per day for the 1 mechanic and at the overtime rate of M$1.50 per hour for 6 hours each working day for the 3 men and 1 mechanic	$ 900.00
(13)	The cost of employing 2 men to watch *Yuling No. 2* from 28th day of December 1967 to 17th day of January, 1968 (21 days) at M$5.00 each per day	$ 210.00
(14)	The cost of wire ropes used for upturning *Yuling No. 2*	$ 4,212.32
(15)	The cost of hiring 4 tractors at M$500.00 each	$ 2,000.00
(16)	The cost of employing 8 men to connect wire ropes from *Yuling No. 2* to the tractors for 2 days at M$7.00 each per day and at an overtime rate of M$1.50 per hour each	$ 256.00
(17)	The cost of employing 2 supervisors in the course of salvaging *Yuling No. 2* Salary for 3 months	$ 3,600.00
	Travelling allowance and Hotel Charges	$ 600.00
	Air fares	$ 140.00
(18)	The cost of hiring 1 tugboat and one outboard motor for use in salvaging *Yuling No. 2* for 3 days at M$150.00	$ 450.00
(19)	The cost of repairs effected on *Yuling No. 2*	$10,540.00
(20)	The cost of 1 winch and 1 anchor for *Yuling No. 2*	$ 2,456.19
	Total:	M$40,534.51

The defendants resisted these claims. In their defence the defendants admitted the making of the policy of marine insurance. Paragraphs 1, 2, 3, 4, 5 and 6 are in the following terms: —

"1. The defendants admit the making of the policy of marine insurance referred to in paragraphs 1 and 2 of the statement of claim, but deny that the plaintiff is entitled to the payment claimed thereunder or any payment.

2. No admission is made as to the loss and expense alleged in paragraph 3 of the statement of claim.

3. In the said policy, the plaintiff warranted as follows:— 'Warranted whilst engaged in carrying logs, heavy equipment and general cargo between Sarawak, Brunei and Sabah ports.'

4. In breach of the warranty the plaintiff loaded the YULING NO. 2 with a full bulk cargo of 700 tons of stone and whilst so loaded the said vessel capsized as alleged in paragraph 3 of the statement of claim.

5. In the premises, the defendants are entitled to avoid the said policy.

6. In the alternative if, which is denied, the defendants are liable to the plaintiff under the said policy, the said policy covered total and/or constructive total loss only including salvage charges. In the premises, the plaintiff's claim for repairs to and purchasing equipment for the said vessel (being items (19) and (20) of the particulars to paragraph 3 of the statement of claim) are denied."

The plaintiff repeated in his evidence what he had said in his statement of claim. An extra ½ per cent premium for the purpose of including salvage cost was paid by the plaintiff after consultation with the agent of American International Assurance in Miri.

He went on to say that he entered into a contract to carry stones with the Public Works Department at a flat rate of $17 per ton. The vessel is used for his own purpose as well as on hire. Whenever it is used for cargoes like logs, heavy equipment or cement the vessel is confined for that special cargo only.

It is necessary that I should make some detailed reference to the expenses incurred as these may be relevant to the question before the court.

It has not been disputed by counsel for the defendants that the charges contained in the bills submitted to defendants by the plaintiff had been incurred by the plaintiff.

The substance of the evidence given by plaintiff in regard to the particulars of loss and expenses was that he was unable to say whether all four tugboats mentioned in items No. (1), (2), (3), (4) and (5) belong to his company.

Insofar as items (6) and (7) were concerned, the workmen were engaged by the plaintiff.

Item (8) represents charges for tools and workmen hired by the plaintiff.

Items (9) and (11) — these are charges for tools hired by plaintiff.

Items (10), (12), (13), (14) and (15) — they were wages for workmen hired by the plaintiff.

Item (16) are charges for purchase of equipment.

Item (17) are charges for hire of equipment.

Item (18) are hiring charges of one tugboat and one outboard motor hired by the plaintiff.

Items (19) and (20) represent repairs and costs incurred by plaintiff after the rescue of barge.

All the expenses represent either the plaintiff's own expenses or expenses incurred by contract.

In re-examination the plaintiff said he incurred the expenses for salvaging the barge on instructions of the insurance company.

The defendants do not dispute that the carriage of one type of cargo at any one time by the barge does not breach the cargo warranty.

Counsel for the defendants elected not to call any evidence and rested his case upon his submission.

At the outset it was agreed on all hands to deal with the issue of liability and leave the matter of assessment of damages to be determined by the registrar if the court rules in favour of the plaintiff.

It is convenient at this stage to state what in my judgment is the law applicable to the determination of the issue in this matter.

It was contended that in accordance with the Marine Insurance Act, 1906, which codified the English law, two different types of charges and two different types of losses must be distinguished.

Insofar as *charges* are concerned, there are two different charges. They are salvage charges and particular charges.

(a) *Salvage charges* are charges imposed by a salvor under maritime law for salvage work voluntarily undertaken to salve a vessel in distress.

(b) *Particular charges* otherwise known as suing and labouring charges.

These are charges other than salvage charges incurred for the safety and preservation of the subject-matter.

Where, as here, the expenses incurred by the plaintiff to rescue the capsized barge would appear to be particular charges and not salvage charges.

These would appear to be expenses included in the "particulars of the said loss and expenses" — Items (1) - (18).

It was contended that if salvage charges are covered the policy must expressly provide for such cover.

If particular charges otherwise known as "suing and labouring charges" are covered this should be provided for by the insertion of a clause in the policy known as "sue and labour cost".

It is to be observed that the present policy does not appear to have this clause.

If, as is contended by the plaintiff that Items (1) - (18) are particular charges, and not salvage charges, the former is not covered by the policy.

Next, I turn to the types of *losses*.

There are two, namely —

(1) *Total loss* — either *actual* or *constructive*, and

(a) *Actual loss* which is divided into three types —

(i) destruction of subject-matter;

(ii) subject-matter has undergone a complete change of identity, for example, chemicals are mixed with water; and

(iii) subject-matter is irretrievably lost, *i.e.* not money loss but irretrievably lost.

(b) *Constructive loss* which is divided into two types —

(i) when subject-matter is reasonably abandoned because its actual loss appears inevitable; and

(ii) when expenditure for preserving the subject-matter would exceed the value of subject-matter after incurrence of expenditure. In other words, the subject-matter is financially not worth salving.

The present case does not appear to be a case of total loss, either actual or constructive.

(2) *Partial loss* — otherwise known as partial average loss.

This refers to loss other than total loss.

Items (19) and (20) would appear to be partial loss items, since they represent costs of repairs and replacements of damaged parts of the barge.

At this stage I would refer to such provisions in the policy (Exhibit P.1) as appear to be relevant.

Part 1 of the policy contained the following provisions: —

"It is agreed that the practice of English Lloyds shall be recognized as the standard for adjusting claims under this Policy.

Warranted all questions of liability arising under this Policy are to be governed by the laws and customs of England."

Paragraph 1 of the Institute Standard T.L.O. Clause (Hulls), which is incorporated into the provisions of the policy, provides as follows: —

"1. This insurance covers only —

Total loss (actual or constructive) of the vessel (including total loss directly caused by: —

Accidents in loading, discharging or shifting cargo or fuel

Explosions on shipboard or elsewhere

Breakdown of or accident to nuclear installation or reactors on shipboard or elsewhere

Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull

Contact with aircraft

Negligence of master officers, crew or pilots

provided such loss or damage has not resulted from want of due diligence by the assured, owners or managers.

Masters, officers, crew or pilots not to be considered as part owners within the meaning of this clause should they hold shares in the vessel.

In ascertaining whether the Vessel is a constructive total loss the insured value in the policies on hull and machinery shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

No claim for constructive total loss based upon the cost of recovery and/or repair of the Vessel shall be recoverable hereunder unless such cost would exceed the insured value in the policies on hull and machinery."

Page 2 of the policy sets out the following warranties, stipulations and/or conditions: —

"This policy insures against total and/or Constructive total loss only as per Institute Standard TLO Clauses (Hulls — 1, 6, 64) attached. Including salvage charges.

Warranted whilst engaged in carrying logs, heavy equipment and general cargo between Sarawak, Brunei and Sabah Ports. Warranted single tow."

But the present policy is a T.L.O. policy. The policy does not cover partial average loss or partial loss.

It follows that Items (19) and (20) are left uncovered by the policy.

Now it is necessary to examine the relevant provisions of the policy at page 2 —

"Warranted whilst engaged in carrying logs, heavy equipment and general cargo between Sarawak, Brunei and Sabah Ports. Warranted single tow."

The question arises what is meant by the expression "general cargo".

It will be convenient first to deal with the expression "bulk cargo". "Bulk cargo" is defined in *International Maritime Dictionary* (2nd Edition) as —

"usually a homogeneous cargo stowed in bulk, that is to say, loose in the hold and not enclosed in any container such as boxes, bales, bags, casks, and so on. Also called bulk freight. Bulk cargo may be composed of (1) free flowing articles such as oil, grain, coal, ore, and so on, which can be pumped or run through a chute or handled by dumping; (2) articles that require mechanical handling such as coke, bricks, pig iron, lumber, steel beams, and so on."

It follows that "stones" is within the definition of "bulk cargo".

"General cargo" on the other hand is defined at page 328 of *International Maritime Dictionary* as —

"A cargo composed of miscellaneous goods carried in units or small quantities which vary in weight, size, condition, nature and class. Commodities for which no rates of freight are specifically named but usually well above the average. Also called package freight (U.S.)."

It follows that the expression includes unit cargoes of a miscellaneous type. It has a special maritime meaning.

It is to be observed that the warranty is expressed as "logs, heavy equipments and general cargo".

In the present case there is not the slightest doubt that it is "bulk cargo" and not "general cargo", stones being "bulk cargo".

Having now stated the meaning assigned to the definitions I must refer to the cases cited in support of the propositions.

"Bulk cargo" according to Scott L.J. in *Hird* v. *Rea, Ltd.*[1] in the passage said —

"In my view, that submission is wholly unfounded. The phrase "bulk cargo" is a very well-known phrase which all of us who have had to do with shipping litigation have known all our professional lives: it means coal, grain, sugar, various chemicals and so on, which are loaded in bulk, which are of a character inclined to run under some circumstances, like sand, and which are not either cases or bags or individual pieces like machinery or timber. These smooth boards are, in my view, quite obviously not bulk cargo and consequently that regulation has no application."

That being so, cargo of stones is really "Bulk Cargo".

Similar statement of principle was made in an action upon two policies of insurance upon goods in respect of a total loss of 1,023 bags of linseed, part of a larger quantity, shipped on board the "Waban" for a voyage from Calcutta to London, where Jervis C.J. in *Ralli* v. *Janson*[2] said —

"It was not denied that, if the linseed had been shipped in bulk, and an equal or even greater portion of it had been lost in a similar way, the warranty would have exempted the underwriters from liability."

It seems clear upon the authorities that the cargo containing 700 tons of stone is "bulk cargo" and not "general cargo".

I pass next to consider the question of the construction of warranties.

The construction of warranties has been laid down in *British Shipping Laws*, Volume 10, *Cap. 19*, paragraph 649, as follows: —

"A warranty, like every other part of the contract, should be construed according to the understanding of merchants. It must be construed, said Lord Esher, 'according to its ordinary acceptance among the class between whom the documents passed, unless by usage it has acquired a wider or narrower interpretation among men of that class'. 'The same broad rules of construction,' said Brown L.J., 'apply to the interpretation of a warranty as apply to all commercial documents.' Thus, a warranty does not bind the assured beyond the commercial import of the words, but it binds him to their full extent."

The effect of breach of warranties is discussed in paragraphs 643 and 644 of the same volume —

"643. The first great distinction, then, between an express warranty and a representation, is that the former is always, and the latter seldom, if ever, written on the face of the policy; the second main distinction between them is, that while a representation may be satisfied with a substantial and equitable compliance, a warranty requires a strict and literal fulfilment, i.e., what it avers must be literally true; what it promises must be exactly performed.

Every policy, in fact, in which an express warranty is inserted is a conditional contract, which may be avoided by the insurer unless the warranty be literally complied with.

Hence all inquiry into the materiality or immateriality to the risk of the thing warranted is entirely precluded; and so are all questions as to a substantial compliance with the warranty. 'It is perfectly immaterial,' said Lord Mansfield in *de Hahn* v. *Hartley*, 'for what purpose a warranty is introduced, but, being inserted, the contract does not exist unless it be literally complied with'. 'The very meaning,' said Ashurst J., 'of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally so.' 'It is a clear and first principle of insurance law,' said Lord Eloon in *Newcastle Fire Insurance Co.* v. *Macmorran*, 'that when a thing is warranted to be of a particular nature or description, it must be exactly what it is stated to be. It is no matter whether material or not; the only question is, is this thing *de facto* I have signed?' Thus in *Yorkshire Insurance Co.* v. *Campbell* where a horse insured by a marine policy was described as 'by Soult X St. Paul (mare)' and it was found that the pedigree was incorrectly stated, the Privy Council held that these words of description amounted to a warranty, and that the assured could not recover for the loss of the horse."

Then comes another set of provisions dealing with "breach and loss need not be connected".

"644. Hence, although the loss may not have been in the remotest degree connected with the breach of the warranty, the underwriter is nonetheless discharged on that account from all liability for the loss if the warranty have been in fact broken."

At this point it should be added that the case law has been codified in section 33 of the Maritime Insurance Act, 1906, which is in the following terms: —

"33. *Nature of warranty.* — (1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date."

Now a word as to the authorities. The case of *Overseas Commodities Ltd.* v. *Style*[3] is I think in point. McNair J. at page 558 said —

"The second submission — namely, that the warranty is to be read distributively — involves, in my judgment, that each of the policies must be severed into as many contracts of insurance as there are tins covered by that policy. By section 33(3) of the Marine Insurance Act, 1906, it is provided that

A warranty ... is a condition which must be exactly complied with, whether it be material to the risk or not.

A condition of what? Surely a condition of the contract of insurance. It seems to me to be wholly artificial and illegitimate to attempt to sever the policies in this way. The premium is a single premium calculated at the rate of 22s. per £100 of the amount insured; not at a rate per tin. But, even if it be true that the view which I have expressed is unduly legalistic, the plaintiffs are still left with the difficulty. which I find to be insuperable, that their suggested construction involves, at least, reading in words which are not in the warranty or re-writing the warranty in a different form, such as 'Underwriters are freed from liability in respect of any tins not marked....'

The persuasive argument by Mr. Roskill based upon the hardship or unreasonableness involved in this construction is, I think, met by the very nature of the express warranty in marine insurance law. It has long been well-established law that an express warranty requires a strict and literal performance: see now the Marine Insurance Act, 1906, Section 33(3). As is stated in *Arnould* on Marine Insurance, 14th ed., Section 632,

Every policy, in fact, in which an express warranty is inserted, is a conditional contract, to be binding if the warranty be literally complied with, but not otherwise.

In the language of Lord Mansfield in *Hibbert* v. *Pigou*, (1783), as reported in 'A Treatise on the Law of Insurance', by Samuel Marshall (1823), Vol. 1, at p. 375; and 'A Treatise of the Law of Marine Insurance, Bottomry, and Respondentia' (1861), also by Samuel Marshall, at p. 280.

... the contract depends on an event taking place. There is no latitude, no equity; the only question is, has that event happened?

Being satisfied that, as regards both policies, a substantial number of the tins — well exceeding any tolerance that could be disregarded under the *de minimis* rule — were not marked with a code which enabled the true and correct date of manufacture to be established, I have no option but to hold that the breach of the express warranty affords the underwriters a complete defence in this action."

When one examines the policy, one finds the warranty takes the following form —

"This Policy insures against Total and/or Constructive Total Loss Only as per Institute Standard TLO Clauses (Hulls — 1, 6, 64) attached. Including Salvage Charges."

The question which arises is

"Has the plaintiff satisfied the court that his claim is covered by the policy?"

The word "only" according to the canons of construction limits the claim to "Total and/or Constructive Total Loss."

Next I come to the Institute Standard T.L.O. Clause (Hulls) which provides in paragraph 1 thereof the following —

"No claim for constructive total loss based upon the cost of recovery and/or repair of the Vessel shall be recoverable hereunder unless such cost would exceed the insured value in the policies on hull and machinery."

"Partial and total loss, actual loss and constructive total loss" are defined in sections 56, 57 and 60 of the Marine Insurance Act, 1906 respectively —

"56. *Partial and total loss.* — (1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2) A total loss may be either an actual total loss, or a constructive total loss.

(3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

(4) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

(5) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.

57. *Actual total loss.* — (1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need be given.

60. *Constructive total loss defined.* — (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss —

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival."

The amount claimed is $40,534.51 and is less than the amount insured. It follows it is not a constructive total loss.

If, on the other hand, the claim exceeds the amount insured, then it will be considered as a constructive total loss.

Neither in the present case is it a constructive total loss, the claim being less than the amount insured. Nor is it an actual total loss, the barge having been saved.

That leaves one further point with which I must deal, namely, particular average loss.

By section 64 of the Marine Insurance Act, 1906, it is provided that —

"64. *Particular average loss.* — (1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average."

Particular average loss is for repairs — Items (19) and (20). This must be distinguished from salvage charges.

Particular average loss is for repairs and would appear to cover Items (1) — (18).

That brings me to salvage charges.

By section 65 of the Marine Insurance Act, 1906 it is provided that —

"65. *Salvage charges.* — (1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.

(2) 'Salvage charges' means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred."

The plaintiff can recover this only if the policy covers this charge *i.e.* suing and labouring charge.

Suing and labouring clause is dealt with in section 78: —

"78. *Suing and labouring clause.* — (1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss."

Now in determining this question, regard must be had to the passage in *Templeman* on Marine Insurance (4th Edition) at page 112 on sue and labour clause: —

"Next in order in the policy follows what is known as the Sue and Labour Clause. It reads as follows:

'And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantiy of his sum herein assured.' ";

and at page 275 —

"It will be noted, in the first place, that the liability of an underwriter to reimburse the assured in respect of salvage charges is dependent upon the provisions of the policy. For instance, under a policy on ship against the risk of 'total loss only', there would be no liability for salvage charges. Sue and labour charges incurred to avert a total loss would be recoverable under such a policy, assuming the sue and labour clause not to have been deleted, or expressly excluded from the policy, but there is no liability under that clause either for general average or for salvage charges."

To this may be added the commentaries by *Kennedy's* Civil Salvage — 4th Edition — Chapter 3 — at page 25 —

"Rule as to voluntariness

Voluntariness is an essential element of salvage in the sense that if a service is rendered solely under a pre-existing contractual or official duty owed to the owner of the salved property, or solely in the interest of self preservation, it is not a salvage service.

Lord Stowell in *The Neptune* described a salvor as: 'A person who, without any particular relation to the ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship.'

Persons ordinarily unable to claim

In accordance with the general principle of rewarding only volunteers as salvors, neither the crew nor the pilot navigating the ship, nor the owner, master or crew of the tug towing her under a contract of towage, nor the ship's agent, are ordinarily held entitled to obtain salvage reward in respect of the services rendered by them in the preservation of the ship herself or of the lives or the cargo which she carries; for all of these persons are under a pre-existing obligation to work in their respective ways for the benefit of the life and property at risk. In special circumstances, however, where it is proved that, in regard to the services in respect of which they claim, they have done something which was outside the scope of their contractual duties, they may earn salvage reward; these circumstances will be considered in a later part of this chapter."

It is to be observed that the claim is not for salvage charges but for particular charges otherwise known as sue and labour charges.

These charges are not in my opinion covered by the present policy.

Even assuming they are salvage charges upon the authorities they do not appear to have been covered.

Counsel for plaintiff relied on *Yorkshire Insurance Co. Ltd.* v. *Campbell*[4] and *Hart* v. *The Standard Marine Insurance Co. Ltd.*[5] on marine insurance as to the meaning of the word "warranty", and the case of *Miller* v. *Borner & Co.*[6] and *Aktieselskabet Reidar* v. *Arcos Ltd.*[7] as to the meaning of the words "cargo"

and "full and complete cargo", but the court cannot find anything in the cases which can be of assistance to him.

As I have indicated above, that depends upon a construction of the relevant clauses in the policy and the circumstances in which they were made and to which they relate.

As appears quite clearly from the cases cited by counsel for the defendants, the claim must fail for the reasons given.

It was also suggested in argument by counsel for plaintiff that the defendants are estopped by their admission in paragraph 1 of their defence.

It is true the defence referred to salvage charges in paragraph 1 of their statement of defence, but it is to be observed that the defendants proceeded on the assumption that they were as stated in paragraph 1 of the statement of claim.

The plaintiff has not adduced any evidence to show that they are indeed salvage charges.

On the view I take there really was no evidence before the court capable of supporting the existence of salvage charges.

While feeling a certain amount of sympathy with the plaintiff under the circumstances I am unable to see on what grounds it can possibly be held that he is entitled to any of the expenses incurred (Items (19) and (20) having been abandoned during the trial by counsel for the plaintiff).

I would therefore dismiss the claim with costs.

Claim dismissed.

ONG CHAT PANG & ANOR. v. VALLIAPPA CHETTIAR

[F.C. (Azmi L.P., Suffian and Gill F.JJ.) January 4, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 31 of 1970]

Land Laws — Contract for sale of land — Effect of — Covenant — Registration of caveat by Registrar of Titles — Petition against rejection — Claim for specific performance of contract of sale against person claiming title from vendor under registered sale-deed executed after the contract — Onus on defendant to show that he is a bona fide purchaser for value — Land Code (F.M.S. Cap. 138), ss. 42, 237 — Specific Relief (Malay States) Ordinance, 1950, s. 26.

The first and second defendants in this case had agreed in writing on November 2, 1957 to sell their land to the plaintiff for $30,000. The plaintiff paid $15,000 towards the agreed purchase price before January 24, 1958 on which date he lodged a caveat against the land with the Registrar of Titles. On the same day the third and fourth defendants approached him and offered to pay him $10,000 to give up his rights under the agreement and to withdraw his caveat. He refused. On the morning of January 30, 1958 he called at the land office and discovered that his caveat had been rejected and that the land had been registered in the names of the third and fourth defendants in pursuance of a document of transfer in their favour, purporting to have been executed on January 17, 1958 but stamped and presented for registration on January 30, 1958. On a petition to the High Court against the rejection of his caveat the plaintiff obtained an order on May 5, 1958 directing the Registrar of Titles to register his caveat as on the date of its presentation with a further direction that the caveat be removed after four weeks from the date of the order unless within that period the plaintiff brought an action for specific performance of the sale agreement against the first and second defendants as the registered owners of the land at the time of the presentation of the caveat and against the third and fourth defendants as interested parties. The plaintiff commenced his action on May 31, 1958. The first and second defendants took no steps to defend the action and the third and fourth defendants did not adduce any evidence at the trial. The High Court gave judgment for specific performance of the agreement. Against this judgment the second and third defendants appealed.

Held, dismissing the appeal; in this case the onus of proof was on the third and fourth defendants as persons claiming by a title subsequent to the contract for sale, to show that they were *bona fide* purchasers for value without notice of the earlier contracts and as they had failed to do so, judgment had rightly been given against them in favour of the plaintiff.

Cases referred to:-

(1) *Bhup Narain Singh* v. *Gokhul Chand Mahton & Ors.* L.R. 61 I.A. 115.
(2) *Shaw* v. *Foster* (1872) L.R. 5 H.L. 321, 333, 338.
(3) *Lysaght* v. *Edwards* (1876) L.R. 2 Ch. D. 499.
(4) *Rayner* v. *Preston* (1880) L.R. 18 Ch. D. 1, 13.
(5) *Cornwall* v. *Henson* [1899] 2 Ch. 710, 714.
(6) *Crowly* v. *Bergtheil* [1899] A.C. 374, 390.
(7) *Howard* v. *Miller* [1915] A.C. 318, 326.
(8) *Abdulla* v. *Shah* [1959] A.C. 124, 131.
(9) *Tan Ah Boon* v. *State of Johore* [1934] M.L.J. 142, 151.
(10) *Chin Cheng Hong* v. *Hameed & Ors.* [1954] M.L.J. 169, 170.
(11) *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A.C. 209 at pp. 215, 216.
(12) *Bachan Singh* v. *Mahinder Kaur & Ors.* [1956] M.L.J. 97.
(13) *Port Swettenham Rubber Company Case* [1913] A.C. 491.
(14) *London and South Western Railway Co.* v. *Gomm* (1882) L.R. 20 Ch. D. 562, 581.
(15) *Abigail* v. *Lapin* [1934] A.C. 491, 500.
(16) *Barry* v. *Heider* (1914) 19 C.L.R. 197.
(17) *Great West Permanent Loan Co.* v. *Friesen* [1925] A.C. 208.
(18) *Hawkins* v. *Gaden* (1925) 37 C.L.R. 183, 207.
(19) *Haji Osman bin Abu Bakar* v. *Saiyed Noor bin Saiyed Mohamed* [1952] M.L.J. 37.
(20) *Butler* v. *Fairclough* (1917) 23 C.L.R. 78, 91.
(21) *In re Registration of Caveat* (1908) Innes 114.
(22) *Municipal District of Concord* v. *Coles* (1905-06) 3 C.L.R. 96, 108.
(23) *Craig* v. *Kanssen* [1943] 1 K.B. 256.
(24) *Frazer* v. *Walker* [1967] 1 A.C. 569.
(25) *Yong Joo Lin & Ors.* v. *Fung Poi Fong* [1941] M.L.J. 63.
(26) *Bank of New South Wales* v. *O'Connor* (1889) 14 App. Cas. 273, 283.

The following authorities were also cited in argument: *Rawther* v. *Kassim* [1959] M.L.J. 257; *Registrar of Titles* v. *Collector of Land Revenue* [1931-32] F.M.S.L.R. 9, 10; *Jasper's Caveat* [1923] V.L.R. 650, 652; *Registrar of Titles, N.S.* v. *Sockalingam Chetty* 4 F.M.S.L.R. 58; *Castrisque* v. *Imrie* (1870) 4 English & Irish App. Cases, p. 414, 427-9;